IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

TODD D. DAGNALL,

Petitioner, ORDER

v. 06-C-0433-C

PHILLIP KINGSTON, Warden,
Waupun Correctional Institution,

Respondent.

Todd Dagnall has filed a motion for reconsideration of this court's order and corresponding judgment entered January 10, 2007 dismissing Dagnall's petition for a writ of habeas corpus. The court dismissed the petition on the ground that petitioner had not filed it within the one-year limitations period and had not shown that his claim of "actual innocence" was based upon facts that could not have been discovered earlier through the exercise of reasonable diligence.

In his motion for reconsideration, petitioner appears to suggest that I imposed too high a burden in evaluating his claim of actual innocence, requiring him to prove his innocence to an absolute certainty rather than asking whether petitioner had shown that it was more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt in light of new evidence. Petitioner is incorrect. I did not even reach the actual innocence question or consider the likely impact of the alleged "new evidence" on

reasonable jurors because I found that petitioner's claim was not timely brought. I explained that although a claim of "actual innocence" might serve as a gateway to federal review of procedurally defaulted claims, it could not serve as a gateway to *untimely* claims unless it was based upon facts that could not have been discovered earlier. Escamilla v. Jungwirth, 426 F.3d 868, 871-72 (7th Cir. 2005); Gildon v. Bowen, 384 F.3d 883, 887 (7th Cir. 2004) (holding same). Petitioner's claim did not satisfy this requirement because it was based upon facts contained in police reports existing since the time of the murder investigation in the fall of 1997.

In his motion for reconsideration, petitioner alleges for the first time that his trial lawyer did not obtain the police reports and petitioner did not find out about them until he received them from the sheriff's office in August 2006. However, in his brief in opposition to respondent's motion to dismiss, petitioner asserted that the reports *were* provided to defense counsel before trial. Pet.'s Br. in Opp. to Resp.'s Mot. to Dismiss, dkt. #14, at 5. Petitioner's unsworn and self-serving suggestion that he was not aware until August 2006 of the content of these reports, which bear directly on the Gross murder investigation, is patently incredible. Furthermore, petitioner has not explained why he could not have obtained copies of the police reports long before August 2006. To be entitled to tolling of the statute of limitations, petitioner must show that he could not have discovered the facts earlier than he did *and* that he was pursuing his rights diligently,. 28 U.S.C. §

2244(d)(1)(D); Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005). Petitioner has utterly failed to make this showing.

Finally, I note that even if petitioner could show that he could not have discovered the facts underlying his claim of actual innocence any earlier, his claim of actual innocence fails. Petitioner's claim is based upon police reports that indicate that before Gross was murdered, Sheila Trentin had approached at least one and perhaps two men individually and asked them if they would murder Gross for a price. Petitioner suggests that his trial lawyer ought to have used these reports to show that petitioner was an unwitting participant in a murder-for-hire scheme concocted by Trentin and petitioner's co-defendant, Chris Murray. However, at trial, Murray denied that he was acting at Trentin's behest when he accompanied petitioner to Gross's house and bludgeoned him to death. Petitioner has pointed to no evidence other than his own speculations to suggest that Murray was lying.

Furthermore, even if petitioner was somehow "tricked" by Murray and Trentin, that deception is not sufficient to show that it is more likely than not that no reasonable juror would have found him guilty of intentionally murdering Gross. In light of the evidence presented at trial, including petitioner's boots with Gross's blood on them and petitioner's post-arrest statements admitting that he struck Gross in the head several times with a baseball bat, petitioner's claim of innocence is, as respondent asserted in his brief, "fanciful at best."

ORDER

IT IS ORDERED that petitioner Todd Dagnall's motion for reconsideration of the order entered January 10, 2007 dismissing his petition for a writ of habeas corpus is DENIED.

Entered this 1st day of February, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge